160 U.S. 593

TRANSCRIPT OF RECORD.

160-573

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 805.

THE UNITED STATES, APPELLANT,

vs.

HENRY C. FULLER.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 29, 1895.

(16095.)

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1 In the Court of Claims.

HENRY C. FULLER
vs.
THE UNITED STATES. } No. 18327.

I.—*Petition.—Filed March 17, 1894.*

To the Honorable the Judges of the Court of Claims:

The petition of Henry C. Fuller respectfully shows to your honors:

That he is a citizen of the United States and an officer of the Navy thereof, to wit, a mate, having been appointed as such March 4, 1870.

That from March 20, 1888, until August 12, 1891, he was attached to and doing duty as a mate on board the U. S. receiving ship "Vermont," at the navy-yard, Brooklyn, N. Y.

Your petitioner says that under section 1579 and section 1585 of the Revised Statutes of the United States he was entitled to rations while so serving on said receiving ships, or to the commutation price thereof; but that such rations and commutation have been refused him, and he has never received the same.

In support of this claim your petitioner further refers to sections 1556 and 1558 of said Revised Statutes.

Your petitioner therefore prays judgment against the United States in the sum of $380.00.

2 Your petitioner further says that he is the sole owner of this claim, and has never assigned the same or any part thereof to any person; that he is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets, and that he has appointed Robert B. Lines and John Paul Jones, of Washington, D. C., his attorneys for the prosecution of the same.

HENRY C. FULLER,
By ROBERT B. LINES,
Attorney.

Robert B. Lines, being duly sworn according to law, on oath says that he is one of the attorneys for Henry C. Fuller, the petitioner mentioned in the foregoing petition; that he signed the same as such attorney, and that the matters and things therein stated are true to the best of his knowledge and belief.

ROBT. B. LINES.

Subscribed and sworn to before me this 17th day of March, 1894.

ARCHIBALD HOPKINS,
Ch. Clerk Court of Claims.

3 II.—*Traverse.—Filed February 13, 1895.*

And now comes the Attorney-General. on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

4 III.—*Findings of fact and conclusion of law.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

The claimant, a mate in the U. S. Navy, was attached to and served on the U. S. receiving ship "Vermont" from March 20, 1888, to August 14, 1891.

II.

During his said service he was not allowed a ration nor commutation therefor.

III.

Mates have not been regarded as petty officers by the Treasury Department—nor by the Navy Department, prior to the adoption of the Navy Regulations of 1893.

IV.

From the year 1799 masters' mates in the United States Navy were warrant officers, except when acting under temporary and probationary appointments. Warrants were issued to them after at least one year's sea service under a probationary appointment. No such warrants were, however, issued after 1843, and in 1847 a regulation of the Navy Department forbade commanding officers to make such probationary appointments.

On October 7, 1863, the Secretary of the Navy issued the following circular:

"Seamen enlisted in the naval service may hereafter, as formerly, be advanced to the rating of master's mate, and such rating may be bestowed by the commander of a squadron, subject to the approval of the Department, or by the commander of a vessel, with the previous sanction of the Department.

"Seamen so rated will be entitled to the same pay, rank, and privileges as appointed or warranted masters' mates, but will not be released by their rating from the obligations of their enlistment, and may be disrated by the order or with the sanction of the Department. They will not, while rated as masters' mates, be considered as subject to trial by a summary court-martial, nor be disrated by transfer, as in the case of petty officers.

"Seamen rated as masters' mates will not be discharged with that rating, and will be considered as disrated to seamen upon the expiration of their enlistment, but upon their immediate reenlistment the rating of master's mate may be considered as renewed. The acceptance of such renewed rating will be considered as a renunciation of any claim to additional pay for reenlistment. All ratings of masters' mates made by order of the commander of a squadron, and all such ratings renewed by reenlistment, will be reported to the Department as early as practicable."

CONCLUSION OF LAW.

Upon the foregoing findings the court decides as a conclusion of law that the claimant is entitled to recover the sum of ($372.60) three hundred and seventy-two dollars and sixty cents.

BY THE COURT.

5 IV.—*Opinion of the court.*

Nott, J., delivered the opinion of the court:

There is a class of persons in the Navy recognized by the statutes, but whose positions are nonenumerated and undefined. They are termed "petty officers." When we turn to the statutes which concern the Army we can tell who noncommissioned officers are—sergeant-majors, quartermaster-sergeants, sergeants, corporals, &c., &c. They are designated and their pay is regulated by law. In the Navy there are also noncommissioned officers who are likewise designated and their pay fixed, viz, warrant officers—boatswains, gunners, carpenters, and sailmakers. At this point the intimate knowledge of the legislative power with the personnel of the Navy seems to stop. The nonenumerated, nondefined "petty officers," of whom there are now, according to the argument of defendants' counsel, no less than thirty-eight grades in the Navy, are remitted to a kind of naval common law, and the responsibility of providing for their pay is thrown upon the President. (Rev. Stat., § 1569.)

The only question presented by the present case is whether the claimant does or does not belong to this undefined class. It is an anomalous case; for the claimant is contending that he belongs to the lower grade of petty officers, while the defendants are contending that he is temporarily appointed to the duties of a warrant officer, and hence within the exception in Revised Statutes, sec. 1410. Ordinarily higher pay goes with higher grade, but here the anomaly is that higher pay will depend upon lower grade. If the claimant is a petty officer he is entitled to a naval ration; if a warrant officer, he is not.

The reason of this anomaly is that when at sea both warrant and petty officers receive rations; when on shore duty petty officers, inasmuch as they receive materially less pay than warrant officers, are allowed a ration a day, which warrant officers are not. Hence it is that the claimant's right to recover the commutation value of his rations depends upon his being in the lower grade—upon his being nothing more than a petty officer.

He was a mate in the Navy, attached to and serving on the receiving ship "Vermont" from March 20, 1888, to August 14, 1891; and during this service he was not allowed a ration, nor commutation therefor. The coun-

sel for the defendants, with commendable industry and painstaking care, has traced the history of the position, or office, of mate through a labyrinth of statutes and regulations, extending through a period of more than a hundred years. His argument is understood to be this:

Masters' mates were originally petty officers appointed by the captains of their ships. In 1813 a statute provided with reference to certain new ships that masters' mates should be warrant officers and be appointed by the President. In 1835 a statute refers to these "masters' mates" as "warranted masters' mates;" that is to say, apparently recognizes two classes of masters' mates as then existing in the Navy, those who were rated and those who were warranted. In 1842 another statute distinguishes boatswains, gunners, carpenters, and sailmakers as "forward warrant officers;" that is to say, apparently recognizes other warrant officers than boatswains, gunners, carpenters, and sailmakers.

In 1843 the Navy Department determined to drop the office of master's mate, or warranted master's mate, and in 1847 a regulation forbade appointments by commanding officers without the special sanction of the Secretary of the Navy; that is to say, the President ceased to make appointments of warranted masters' mates, and the Navy Regulations forbade commanding officers to make temporary appointments of masters' mates. But the grade was not abolished and old sailors who had been previously appointed continued to hold the office and get the pay.

This continued to be the condition of affairs until the outbreak of the civil war, when the Secretary of the Navy appointed a great number in the volunteer naval service, terming them "acting masters' mates." His action was ratified by the act 24th July, 1861 (12 Stat. L., 272, sec. 2), and he was authorized to make future similar appointments. The
6 act 16th July, 1862 (12 Stat. L., 587, sec. 20), provided that the pay of all officers so appointed should be the pay of those in the Regular Navy, although there was then none in the Regular Navy.

In 1865 the act 3d March, 1865 (13 Stat. L., 539), changed the title of the office of master's mate to "mate," and provided that they should be rated under authority of the Secretary of the Navy; and in 1870 the act 15th July, 1870 (16 Stat. L., 330, sec. 3), recognized them in the Regular Navy by prescribing their rate of pay for sea duty, shore duty, and when on leave or waiting orders. Through all this period, it is contended by the counsel for the defendants, acting masters' mates and mates were temporarily appointed to the duties of warrant officers, and were so recognized and held to be by the Treasury and Navy Departments.

It is manifest, therefore, that there was an extraordinary medley of statutory provisions relating to the naval office of mate when Congress undertook the work of codifying the laws by the enactment of the Revised Statutes. There had been, and perhaps still were, two kinds of mates or masters' mates authorized by statutes—those who were appointed by commanding officers and those who were appointed by the President; and apparently both statutes were in force and unrepealed. There had also been two kinds of warrant officers in the Navy—"warrant officers" and "forward warrant officers." There were statutes which recognized "warranted masters' mates" and statutes which recognized "forward warrant officers," though no such positions had been defined by statute. One act of Congress authorized appointments to be made by the President

and another by the Secretary of the Navy. For twenty years the Navy Department had practically excluded the office of master's mate from the naval service, though no statute required or authorized its exclusion. In a word, there were "masters' mates," "warranted masters' mates," "warrant officers," "forward warrant officers," "acting masters' mates," "mates," and "acting mates," with the power of appointment given by unrepealed statutes to commanding officers, to the President, and to the Secretary of the Navy.

The Revised Statutes undoubtedly cleared and changed the law, and it is believed that all of the provisions bearing upon the present question are to be found in the following sections:

"SEC. 1405. The President may appoint for the vessels in actual service, as many boatswains, gunners, sailmakers, and carpenters as may, in his opinion, be necessary and proper.

"SEC. 1406. Boatswains, gunners, carpenters, and sailmakers shall be known and shall be entered upon the Naval Register as 'warrant officers in the naval service of the United States.'

"SEC. 1408. Mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years.

"SEC. 1409. The rating of an enlisted man as a mate, or his appointment as a warrant officer, shall not discharge him from his enlistment.

"SEC. 1410. All officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, and except secretaries and clerks, shall be deemed petty officers, and shall be entitled to obedience, in the execution of their offices, from persons of inferior ratings.

"SEC. 1569. The pay to be allowed to petty officers, excepting mates, and the pay and bounty upon enlistment of seamen, ordinary seamen, firemen, and coal heavers in the naval service shall be fixed by the President.

"SEC. 1579. No person not actually attached to and doing duty on board a seagoing vessel, except the petty officers, seamen, and ordinary seamen attached to receiving ships or to the ordinary of a navy-yard, and midshipmen, shall be allowed a ration."

7 In these provisions of the Revised Statutes a number of things become plain. (1) Boatswains, gunners, carpenters, and sailmakers are the only officials designated as "warrant officers in the naval service of the United States." (2) Warrant officers are "appointed" by the President without restriction; mates are "rated," not by, but under authority of, the Secretary of the Navy, and the rating is restricted to those who have "enlisted for not less than two years." (3) All officers not holding commissions or warrants, that is to say, all officers other than commissioned officers or warrant officers, "shall be deemed petty officers." A mate is not a commissioned officer or a warrant officer or a secretary or a clerk; neither is he a person "temporarily appointed" to the duties of a commissioned officer or to the duties of a warrant officer. (4) Section 1569 is, therefore, perfectly consistent with the preceding provisions of the Revised Statutes when it impliedly classes mates with petty officers by saying: "The pay to be allowed to petty officers, excepting mates," "shall be fixed by the President."

The reason why the statute uses the words "excepting mates" is because their pay is fixed by section 1556. If the statute did not con-

tain this clause, if it did not expressly make mates an exception to the general provision that the pay to be allowed to petty officers shall be fixed by the President, there would be a strong statutory implication that a mate, whose salary is fixed by law, is not a petty officer. The insertion of that clause is consequently a strong statutory implication that a mate is a petty officer, as all of these provisions of law are parts of one statute and were enacted at one time and received unusual scrutiny. The language of the last section is an unusually significant indication of the legislative intent.

After the enactment of the Revised Statutes the subject seems to have obtained little attention in the Navy and Treasury Departments. In the latter the Revised Statutes were not deemed to have effected any change in the law, and mates continued to be treated as the lineal descendants of "warranted masters' mates," and consequently as warrant officers. At last the Navy Department spoke definitively by the Navy Regulations, 1893, "mates are petty officers," article 28. The subject belongs to the Navy Department, and the Navy Regulations are not the hasty utterance of transitory orders, but the well-considered act of the President himself for the guidance of the entire Navy—a work, in short, authorized by law and having in the Navy the force of law.

The court would hesitate long in declaring a regulation of the Army or Navy to be void. In the present case the Regulations, 1893, most certainly have statutory provisions behind them which might well be construed by the President and Secretary of the Navy as they were construed. It is certainly a case where the interpretation of the statute by an Executive Department charged with its administration should not be disturbed.

The judgment of the court is that the claimant recover $372.60.

8 V.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 18th day of February, A. D. 1895, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree, that the claimant, Henry C. Fuller, do have and recover of and from the United States the sum of three hundred and seventy-two dollars and sixty cents.

BY THE COURT.

9 VI.—*Application of defendants for and allowance of appeal.*

HENRY C. FULLER
v.
THE UNITED STATES. } 18327.

From the judgment rendered in the above-titled cause on the 18th day of February in favor of the claimant, the defendants, by their Attorney-General, on the 19th day of March, 1895, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Attorney-General.

Filed March 19, 1895.
Allowed in open court Nov. 26, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

10 In the Court of Claims.

HENRY C. FULLER
vs.
THE UNITED STATES. } No. 18327.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 27th day of November, 1895.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16095. Term No., 805. The United States, appellant, vs. Henry C. Fuller. Court of Claims. Filed November 29, 1895.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

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APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

CHARLES C. BINNEY,
Assistant Attorney,
J. E. DODGE,
Assistant Attorney-General,
for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANT,
v.
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APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

The appellee, Henry C. Fuller, a mate in the United States Navy, was attached to and served on the U. S. receiving ship *Vermont* from March 20, 1888, to August 14, 1891. During his service on the said ship he was not allowed a ration nor commutation therefor. He brought suit for the value of the rations which he would have received during the said service if he had been recognized as a petty officer, on the ground that a mate was really a petty officer and therefore entitled to

a ration when serving on a receiving ship. The Court of Claims gave judgment in his favor for $372.60 February 18, 1895, whereupon the United States took this appeal. (Rec., 2, 6.)

ASSIGNMENTS OF ERROR.

The Court of Claims erred—

1. In holding that a mate in the United States Navy was a petty officer.

2. In not holding that a mate in the United States Navy was neither a warrant officer nor an officer temporarily appointed to the duties of a warrant officer.

3. In entering judgment in favor of the appellee for $372.60.

BRIEF OF ARGUMENT.

The statute regulating the issue of rations on receiving ships is as follows:

> No person not actually attached to and doing duty on board a seagoing vessel, except the petty officers, seamen, and ordinary seamen attached to receiving ships or to the ordinary of a navy-yard, and midshipmen, shall be allowed a ration. (Revised Statutes, section 1579.)

The appellee's contention is that he was a petty officer, viz, a mate, and therefore should have been allowed a ration when serving on the receiving ship *Vermont*. The appellant, on the other hand, submits that the appellee could not properly have been allowed a ration when so serving, because a mate is not a petty officer, but either a

warrant officer or an officer "temporarily appointed to the duties of a warrant officer," within the meaning of the following statute:

> All officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, and except secretaries and clerks, shall be deemed petty officers, and shall be entitled to obedience in the execution of their offices from persons of inferior ratings. (Revised Statutes, section 1410.)

The real question at issue, therefore, is whether a mate is a petty officer or not.

The first distinction to be noted between mates and petty officers is that the former are officers of the United States within the meaning of Article II, section 2, of the Constitution, while the latter are not. Revised Statutes, section 1408, provides:

> Mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years.

The verb "to rate" is a technical naval expression, meaning "to appoint a sailor to a higher grade." (Naval Encyclopedia.) The fact that only sailors already in the service can be rated is what distinguishes the word "rate" from the more general word "appoint," but a "rating" is none the less an appointment. A power to rate is a power to appoint from a particular class, and this power, in the case of mates, has been vested by Congress in the Secretary of the Navy. An appointment

"under authority of" the Secretary is an appointment by him, for although the initiative, the selection of a man for appointment, may rest with someone subordinate to the Secretary, yet the latter has the power to decide whether the man shall be appointed or not, and that is the essence of the power of appointment. The case comes precisely within the doctrine laid down by this court in *United States* v. *Hartwell* (6 Wall., 385, 393), where Congress had authorized the assistant treasurer at Boston to appoint certain clerks "with the approbation of the Secretary of the Treasury," and it was held that such clerks were "appointed by the head of a Department within the meaning of the constitutional provision upon the subject of the appointing power." This case was distinguished, and its doctrine upheld, in *United States* v. *Germaine* (99 U. S., 508, 511) and *United States* v. *Smith* (124 *id.*, 525, 533), in which latter case the court, per Mr. Justice Field, said:

> The defendant there [in *United States* v. *Hartwell*], it is true, was a clerk in the office of the assistant treasurer at Boston, but his appointment by that officer under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the court, rendered his appointment one by the head of the Department within the constitutional provision upon the subject of the appointing power.

The fact that mates are officers within the meaning of the Constitution is not only clearly deduced from the language of the act regulating their appointment, but was recognized by the Navy Regulations in force when the claim in suit accrued, and for some time before, which

provided that mates should be appointed on passing an examination held by a board composed of three line officers, one of whom was to be of or above the rank of lieutenant-commander. (Regulations of 1870, par. 874; Regulations of 1876, p. 93, par. 2.) An inspection of these regulations shows, in the first place, that no one not an officer in the constitutional sense was appointed or promoted on examination by a board; secondly, that the board for the examination of candidates for mates was of the same character as that convened in the case of boatswains, gunners, carpenters, and sailmakers, who are specially declared in the Revised Statutes (sec. 1406) to be warrant officers; and thirdly, that the board was of the same character as that formerly convened in the case of a master's mate, who, as the court below has found, was also a warrant officer. (Regulations of 1865, par. 231.)

Petty officers, on the other hand, though called officers in Revised Statutes, section 1410, are not such in the constitutional sense of the term, being, under the regulations prior to 1893, merely men of the crew of a vessel, rated as petty officers by the commanding officer for the period of his command. At the expiration of his command they were all disrated, but were, as is well known, usually rated again to the same positions by his successor. They could be disrated at any time for good and sufficient cause, to be stated in the log. (Navy Regulations of 1865, pars. 269–272; Regulations of 1870, pars. 910–913; Regulations of 1876, pp. 96, 97, pars. 1–4; p. 127, par. 12.) The only exception to these rules was introduced by the Regulations of 1876 (p. 100, par. 22), which pro-

vided that an enlisted man who had received three good-conduct badges under three consecutive enlistments (i. e., who had served twelve years) should, if qualified, be enlisted as a petty officer, not to be disrated except by sentence of a court-martial.

The court below has found, as a fact, that mates have never been regarded as petty officers by the Treasury Department, and that the Navy Department never regarded them as such until the adoption of the Navy Regulations of 1893. As an instance of this practice the Navy Regulations of 1876 (p. 64), in force down to 1893, classes mates with ensigns and midshipmen as steerage officers, while this practice in the Treasury Department means that they are always allowed mileage when traveling under orders, under the *Act of June 30, 1876* (19 Stat., 65), to which allowance petty officers are not entitled, because they are not, as mates are, "officers of the Navy" within the meaning of that act, where the word "officers" is used in the constitutional sense. This unvarying executive construction of both Departments for so many years would be sufficient to determine the meaning of the statute in regard to mates, if its wording were in anyway doubtful. As this court has said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. (*United States* v. *Moore*, 95 U. S., 760, 763.) To the same effect, *Brown* v. *United States* (113 U. S., 568); *United States* v. *Johnston* (124 *id.* 236, 253); *Pennoyer* v. *McConnaughy* (140 *id.*, 1, 23).

In point of fact, it is unnecessary to fall back upon executive construction, because Revised Statutes, section 1408, makes it clear that mates are constitutional officers, and hence they can not be petty officers. Were mates petty officers, moreover, the *Act of August 1, 1894* (28 Stat., 212), would have referred to them as such and not as "officers." For the purposes of the present case it may be also unnecessary to consider to what class of constitutional officers they belong, but should the court wish to inquire into the matter a satisfactory conclusion may be reached, as the following will show.

From the language of Revised Statutes, section 1410, cited above, it is certain that mates must be either warrant officers or officers temporarily appointed to the duties of a warrant officer, and it is submitted that while they have never been expressly declared, either by statute or regulation, to be either the one or the other, the most logical conclusion is that they are really warrant officers.

A "warrant" is "an instrument conferring authority upon persons, inferior to a commission" (Naval Encyclopedia); "in the Army and Navy a writ or authority inferior to a commission" (Century Dictionary). A warrant does not have to be in any special form, and hence whatever document the Secretary of the Navy employs to authorize the appointment of (or rather, to express more fully the Secretary's act, to appoint) a mate is really a warrant. If, as was held in *United States* v. *Moore* (95 U. S., 760), a mere notification from the Secretary of the Navy is sufficient for the appointment of a passed assistant surgeon, the document whereby the Secretary

exercises his appointing power in the case of a mate would be a warrant were it nothing more than a mere notification.

It has already been stated that down to 1893 candidates for appointment as mates were examined by a board of the same composition as in the case of boatswains, gunners, carpenters, sailmakers, and formerly master's mates, all of whom were warrant officers, and that mates were classed with ensigns and midshipmen as steerage officers. The Naval Encylopedia states that a mate is "a line officer in the Navy not in the line of promotion," and that boatswains, gunners, carpenters, and sailmakers "rank next below mates." The *Act of August 1, 1894* (28 Stat., 212), increasing the pay of mates, also provides that—

> The law regulating the retirement of warrant officers in the Navy shall be construed to apply to the twenty-eight officers now serving as mates in the Navy.

If mates are appointed as warrant officers are, given the status of steerage officers—which is not accorded to boatswains, gunners, carpenters, and sailmakers—given a rank above those officers, and retired as warrant officers are, the conclusion is practically irresistible that, being constitutional officers of some kind, they must be warrant officers. It is true that the act of 1894, above cited, seems to have been passed under the impression that mates were not warrant officers, but if they were so under Revised Statutes, section 1408, any subsequent impression of Congress would be immaterial.

It is indisputable that the mates of to-day stand in the place of the master's mates of the first half of the century (who in the British navy were called simply mates), and that the latter were warrant officers.

The title of "mate"* in the United States Navy dates from the *Act of March 3, 1865* (13 Stat., 539), which reads:

> SEC. 2. Acting master's mates shall be styled mates, and the Secretary of the Navy is hereby authorized to increase their pay to a sum not exceeding thirty dollars a month.
>
> SEC. 3. Hereafter mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years, and such rating of an enlisted man or his appointment as an officer shall not discharge him from his enlistment.

The term "acting" is defined in the Naval Encyclopædia as "a prefix to denote that a rank is held temporarily," and the term "acting master's mate," as used when the act of March 3, 1865, was passed, applied to two classes of persons. One class consisted of those appointed under the *Act of July 24, 1861*, section 2 (12 Stat., 272) reading as follows:

> The temporary appointments made, or which may be made, by the Secretary of the Navy, of acting

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*** In the opinion of the court below (Rec., 5, line 9) it is inadvertently stated that there were "acting mates" as well as "mates." This is incorrect. The Statutes, Navy Regulations, Navy Registers, and General Orders and Circulars disclose no reference whatever to "acting mates." It is clearly a case of *lapsus calami*, and will not be found in the opinion as printed in the forthcoming volume of the Court of Claims Reports.**

lieutenants, acting paymasters, acting assistant surgeons, acting masters and master's mates, are hereby ratified and confirmed as temporary acting appointments until the return of the vessels in which they are temporarily employed, or until the suppression of the present insurrection, as may be deemed necessary; and the rate of compensation allowed for the several grades specified is hereby legalized and approved.

The other class consisted of seamen "rated" (an expression obviously equivalent to "receiving acting appointments") as master's mates under the circular of October 7, 1863, reading as follows:

> Seamen enlisted in the naval service may hereafter, as formerly, be advanced to the rating of master's mate, and such rating may be bestowed by the commander of a squadron, subject to the approval of the Department, or by the commander of a vessel, with the previous sanction of the Department.
>
> Seamen so rated will be entitled to the same pay, rank, and privileges as appointed or warranted master's mates, but will not be released by their rating from the obligations of their enlistment, and may be disrated by the order or with the sanction of the Department. They will not, while rated as master's mates, be considered as subject to trial by a summary court-martial, nor be disrated by transfer, as in the case of petty officers. (Rec., 2.)

Hence an acting master's mate was a person temporarily employed by the Secretary of the Navy, or by a commander of a squadron or vessel, to act as, or perform the duties of, a master's mate.

The court below has found as a fact that from the year 1799 master's mates in the United States Navy were war-

rant officers, except when acting under temporary and probationary appointments, and that warrants were issued to them after at least one year's sea service under a probationary appointment. (Rec., 2.) It does not appear precisely at what date the regulations governing their appointment, printed in the Navy Regulations for 1865, were adopted, but it must have been prior to 1843, as suggested in Opinions of the Attorneys-General, vol. 11, page 254, and probably prior to 1835, when the Navy pay act mentioned "warranted master's mates," obviously to distinguish them from those under acting appointments. These regulations are as follows:

> A candidate for the appointment of master's mate must be of sober and correct habits; he must be not less than eighteen nor more than thirty-five years of age; he must have been at sea before the mast, or as an officer, at least five years. The recommendation by commanding officers of petty officers or men for zeal or gallantry may entitle them to examination.
>
> No person will receive a warrant as master's mate unless he shall have served at least one year at sea under an acting appointment, and the commanding officers under whom he may have served shall have certified favorably as to his merits. (Navy Regulations, 1865, par. 217, 261.)

Seamen serving as master's mates under acting or temporary appointments were not petty officers, being evidently within the excepted category of those "temporarily appointed to the duties of a warrant officer," mentioned in the *Act of April 23, 1800*, section 1, article 33 (2 Stat., 49).

It would be needless to say more on this branch of the subject were it not that in spite of the express finding that "from the year 1799 master's mates were warrant officers, except when acting under temporary and probationary appointments," the appellee's counsel has undertaken to assert that there having once been a few ships on which master's mates were petty officers, "the distinction between these master's mates and the warranted master's mates, with a marked difference in pay, was kept up in the Navy Registers for many years." (Appellee's brief, p. 3.) There is no ground whatever for this assertion, as a brief review of our naval history as written in the statutes will show.

The earliest mention of "master's mates" in the Statutes at Large is in the *Act of March 27, 1794*, section 3 (1 Stat., 350). Before that time the title was simply "mate," and the pay table in the Rules for the Regulation of the Navy of the United Colonies, adopted November 28, 1775, mates stand between masters and boatswains, receiving the same pay as the latter. (1 Journals of Congress, Folwell's ed., 249.) As boatswains have always been warrant officers, mates were evidently at that time warrant officers also. The act of March 27, 1794, however, refers to master's mates as petty officers, but that act provided for the construction (or purchase) of but six vessels, and that of *April 20, 1796* (1 Stat., 453), cut the number down to three, two of which, the *Constitution* and the *Constellation*, were not manned and employed until after the passage of the *Act of July 1, 1797* (1 Stat., 523). Hence, of all the vessels of the

United States Navy there have been but three of which it can be alleged with certainty that the master's mates aboard them were at any time classed as petty officers. As the number and grade of the officers to be appointed for the service of the additional vessels provided for by the *Acts of April 27 and June 30, 1798, and February 25, 1799* (1 Stat., 552, 575, 621), were to be fixed by the President, and as the Navy Department has no record of those officers, it can not now be learned whether the master's mates were classed as petty officers or as warrant officers, nor even whether these vessels had master's mates among their officers at all. All the vessels provided for by these acts, except the six seventy-fours provided for by the act of 1799, were comparatively small vessels, of from 18 to 32 guns. It is not improbable that a master's mate was not included in their complement of officers, or, at least, not in that of all of them.

After the troubles with the Algerine corsairs and with France were supposed to have passed away, the *Act of March 3, 1801* (2 Stat., 110), authorized the sale of all the vessels of the Navy except thirteen designated frigates, all but six of which might be laid up. It is a matter of history that President Jefferson, being averse to everything that savored of war, exercised to the full the power granted him by this act to reduce the Navy. The *Acts of February 28, 1803, and March 25, 1804* (2 Stat., 206, 291), authorized the acquisition of six vessels, but as none of them exceeded 16 guns it is probable that they had no master's mates.

It would seem, however, that not only on the three vessels to which the acts of 1794 and 1797 referred, but on

all others that may have had master's mates, these officers were classed as warrant officers at least as early as 1799, and invariably thereafter. The rules adopted by the Continental Congress in 1775, as stated above, were eventually superseded by the *Act of March 2, 1799* (1 Stat., 709), which established new rules, providing in section 6 for the distribution of prize money and bounty for capture in certain proportions among the officers and crew according to a certain classification, wherein the "marine officers, the surgeon, purser, boatswain, gunner, carpenter, *master's mate*, and chaplain" are classed together.

The *Act of April 23, 1800* (2 Stat., 45), providing a more complete set of rules and regulations, changed the classification but slightly, and, as far as concerns this particular class, it merely removes captains of marines to the class above. In this classification, therefore, master's mates were placed for the distribution of prize money and bounty for capture along with lieutenants of marines, surgeons, pursers, and chaplains, who were commissioned officers, and boatswains, gunners, and carpenters, who were warrant officers. That certain commissioned officers should be classed with warrant officers for this purpose is not surprising, but that any petty officer should be classed with commissioned officers for this purpose is contrary to the whole spirit of those distinctions of grade that have always been characteristic of the naval service. It may be incidentally observed that the compilation of Laws of the United States Relating to the Navy and Marine Corps, published in 1859, contains a very full

table of contents of the act of 1800. In that table the above class is referred to as follows: "Chaplain, lieutenant marines, surgeon, purser, and warrant officers," which shows conclusively that in 1859 master's mates were regarded as warrant officers, and as having been so in 1800.

The *Act of January 2, 1813*, section 2 (2 Stat., 789), refers to master's mates as warrant officers, and its language does not warrant the inference that the grade of a master's mate differed on the particular vessels therein provided for from what it was in other vessels, or that any change in the grade was then introduced. Master's mates are referred to as being warrant officers in precisely the same language as is used of boatswains, gunners, carpenters, and sailmakers, about whom there can be no dispute. This indicates that the status of master's mates as warrant officers had been settled long before, and, as already stated, this must have been at least as early as the regulations contained in the act of March 2, 1799.

When, therefore, the *Act of March 3, 1813*, section 2 (2 Stat., 821), authorized the President "to appoint such officers and to employ the number of seamen which may be necessary for such vessels as are authorized by law to be put in commission, any law to the contrary notwithstanding," master's mates must be understood as among the officers which he was authorized to appoint, just as petty officers were among the seamen he was authorized to employ.

There is nothing in either the Navy Regulations or the Navy Registers to justify the assertion of appellee's counsel that a grade of master's mates as petty officers

was maintained after the establishment of the grade as a grade of warrant officers, which seems to have occurred in 1799. In so far as the Regulations and Registers refer to them at all, it is always as warrant officers, and where the pay tables draw a distinction between those who had received warrants and those who had not, the latter were obviously those who were serving under acting or probationary appointments as a preliminary to becoming full warrant officers.

The court below has also found that no warrants were issued to master's mates after 1843, and that in 1847 a regulation of the Navy Department forbade commanding officers to make probationary appointments. This regulation (which was dated June 24, 1847, and of which the court will take judicial notice) did not, as the finding might be supposed to indicate, absolutely prohibit such appointments, but merely forbade them without the special sanction of the Secretary of the Navy. The reason stated was that "a master's mate is not included in the complement of any vessel, agreeably to the present table."

The Navy Registers to 1858, inclusive, give the master's mates (steadily decreasing in number, as there were no new appointments) with the other warrant officers, but after 1858 the grade no longer appears, the last appointee having died or left the service. The pay table gives a rate of pay for both warranted and acting master's mates to 1860, inclusive.

It is to be observed that this discontinuance, after 1843, of the practice of issuing warrants to master's

mates was nothing new. After the war of 1812 the grade of master's mate was for a time considered unnecessary, and no new appointments to it were made for at least twenty years. The Register of Commissioned and Warrant Officers for 1819 contains the names of seven master's mates; that for 1820, four; 1822, one; and 1826, and subsequently, none. The Register for 1836 is the first after 1825 to make any mention at all of master's mates as an existing grade of officers. The grade itself was never abolished between 1815 and 1836, and neither was it abolished after 1843, although, as above stated, there were no new master's mates after that date, and none of the old ones remained after 1858. The *Navy Pay Act of June 1, 1860*, section 1 (12 Stat., 26), passed at a time when there were no officers of that grade in the service, and when, therefore, it was unnecessary to provide for their pay, mentions as warrant officers only boatswains, gunners, carpenters, and sailmakers, but it does not declare that those are the only possible warrant officers.

The recognitions of the grade of master's mate as existing, even after it had ceased to be filled, are unmistakable. The act of July 24, 1861, already cited, authorizing temporary appointments of acting master's mates is itself a recognition of the existence of the grade, while the *Act of July 14, 1862*, section 1 (12 Stat., 567), directly refers to masters' mates as warrant officers as follows:

> The pension for total disability for officers, warrant, or petty officers, employed in the naval service of the United States, shall be as follows, viz:

> * * * passed midshipman, midshipman, captain's and paymaster's clerk, second and third assistant engineer, *master's mate*, and all warrant officers, ten dollars per month; all petty officers and all other persons before named employed in the naval service, eight dollars per month.

This section not only classes masters' mates among the warrant officers, but it excludes them from among the petty officers.

The circular of October 7, 1863 (Rec., 2), already quoted, speaks of advancing seamen to the rating of master's mate. Such advance in rating is expressly stated, however, to be no new thing, but to be done "as formerly," i. e., of course, as was done before the regulation of June 24, 1847, cited above, forbade appointments of master's mates by commanding officers without the special sanction of the Secretary of the Navy. In other words, there was a return to the old practice of acting appointments of seamen as master's mates (the practice referred to in sec. 261 of the Navy Regulations of 1865), except, apparently, that the service under such rating or acting appointment (for the "rating" of a seaman as a master's mate and his "acting appointment" as such obviously mean the same thing) did not lead to a seaman's ultimately receiving a warrant as a full-fledged master's mate, the practice of issuing warrants to master's mates still remaining in abeyance. The fact that this latter practice remained in abeyance, however, did not destroy the grade of master's mate as one of the grades of warrant officers, for the circular itself stated that the seamen to which it applied should "be entitled to the same pay,

rank, and privileges as appointed or warranted master's mates," a statement which would have been meaningless had the grade of warranted master's mates (i. e., master's mates as warrant officers) been abolished, for a grade which does not exist can have no pay, rank, or privileges.

These rated or acting master's mates under the circular of 1863 were obviously persons "temporarily appointed to the duties of a warrant officer" under the *Act of July 17, 1862*, section 18 (12 Stat., 610), and therefore were not petty officers. Accordingly, the circular proceeded to state that they should not "be considered as subject to trial by a summary court-martial, nor be disrated by transfer," as petty officers were.

The Navy Regulations of 1865 contain, as already stated, the rules in regard to the appointment of master's mates (pars. 217, 261) as being still in force, and certainly, the grade never having been abolished, it was proper to retain these rules, as they would have become applicable at any moment had the practice of making appointments to this grade of warrant officers revived.

The only authority to the contrary is contained in certain *dicta* in the opinion of Attorney-General Speed in the case of *E. G. Arnold* (11 Op. A. G., 251). The conclusion reached in this opinion, viz, that an acting master's mate was not a warrant officer, and hence that the sentence of the court-martial could lawfully be carried out, was correct; but the same can not be said of every statement in the opinion. It was correctly stated that an acting master's mate "is temporarily appointed to the duties of" a master's mate (p. 253), but,

it is submitted, the further statement that because no warrants had been issued to masters' mates since 1843 the grade of master's mate was not a grade of warrant officers is wholly erroneous.

The opinion seems to be based on an erroneous idea in regard to a supposed "practice of appointing master's mates without warrants, which has prevailed in the naval service since 1843." It does not appear that any such practice had prevailed since 1843. On the contrary, the regulation of June 24, 1847, expressly forbade it, except by special sanction of the Secretary of the Navy, on the ground that "a master's mate is not included in the complement of any vessel, agreeably to the present table." Moreover, it would seem that this special sanction of the Secretary of the Navy was never granted, for the circular of 1863 states that seamen "may hereafter, as formerly, be advanced to the rating of master's mate" by the commander of a squadron or of a vessel (subject in the former case to the approval and in the latter to the previous sanction of the Department), and makes various provisions in regard to men so rated. Had the practice to which Attorney-General Speed refers actually "prevailed in the naval service since 1843," the circular of October 7, 1863, would never have been needed. That it issued is proof that no such supposed practice could have existed.

Moreover, the master's mates appointed without warrants after October 27, 1863, as before June 24, 1847, were not master's mates in the strict sense of the term, but were merely temporary appointees, *acting* master's mates, and were known as such. The act of March 3,

1865, already cited, operated upon all those who performed the duties of a master's mate, and its language is: "Hereafter *acting* master's mates shall be styled mates." It has not been and can not be contended that when that act was passed there were any master's mates in the United States Navy other than the acting master's mates referred to in the act.

It would have been quite sufficient for the purpose of Attorney-General Speed's opinion had he stated that an acting master's mate was not a warrant officer (which was obviously true, because no warrants were issued to such persons), but he stated further that a master's mate was not a warrant officer, apparently because no warranted master's mates were then in service, and the *Act of July 2, 1864*, section 1 (13 Stat., 373), had referred to "the warrant officers of the Navy, viz, boatswains, gunners, carpenters, and sailmakers," saying nothing about master's mates. As there were no master's mates then in service as warrant officers, the language of the act was perfectly correct, but it did not abolish the grade. It merely stated what particular grades of warrant officers were actually in service at that time in the Navy.

Attorney-General Speed's erroneous idea about master's mates necessitated the conclusion that the regulations concerning them were inadvertently retained in the edition of 1865, whereas, the grade not having been abolished when that edition was prepared (which, as the first page shows, was in 1864, though they were not published till April 18, 1865), the regulations were, as already stated, entirely proper, and their retention is contempora-

neous evidence against the theory of the abolition of the grade; better evidence, it may be observed, than the unnecessary remarks of the Attorney-General.

An acting master's mate being, therefore, in 1865, a person "temporarily appointed to the duties of a warrant officer," viz, those of a master's mate, had the act of 1865, above cited, merely changed the title and pay of the office, it would follow that mates also are officers temporarily appointed to those duties. The appointment of acting master's mates under the act of 1861 was, however, expressly authorized as a temporary practice, not to outlast the rebellion, while the acting master's mates under the circular of 1863 were not officers in the constitutional sense. The act of 1865 established the office of mate as a permanent one, to be filled by a mode of appointment recognized by the Constitution, and as already stated, the written declaration of appointment must be regarded as a warrant. It would seem that this act, rather than, as the court below has held, Revised Statutes, section 1406, caused the old office of master's mate to cease to exist. While that office was never abolished in so many words, it is only reasonable to view the establishment of a permanent constitutional office, superseding the temporary appointments to the duties of master's mates, yet not changing those duties, as also bringing to an end the then vacant office of master's mate, or rather reestablishing it under a new title.

Section 1406 of the Revised Statutes, declaring that "boatswains, gunners, carpenters, and sailmakers shall be known and entered upon the Naval Register as 'war-

rant officers of the naval service of the United States,'" merely reenacted section 2 of the *Act of July 2, 1864* (13 Stat., 373), whose first section was referred to above. It declares, as that act declared, that boatswains, gunners, carpenters, and sailmakers shall be known as warrant officers, but not that they are the only warrant officers. The contemporaneous section, 1408, made mates warrant officers in fact, and the mere omission to expressly declare them such in terms, or to enumerate them with the others, can not deprive them of their character.

If it be possible, however, to hold that mates are not warrant officers, then they must be officers "temporarily appointed to the duties of a warrant officer," and in any case not petty officers. In this view of the case the office of master's mate, not having been wholly superseded, may perhaps be regarded as still existing, and at all events the duties of a mate, being those of a master's mate, are those of a warrant officer, so that a mate is simply the same officer as an acting master's mate before the act of 1865, which may be regarded as having changed the title of the office merely, and not the office itself.

The exception in Revised Statutes, section 1410, of "persons temporarily appointed to the duties of a warrant officer" from the class of petty officers dates from the *Act of April 23, 1800*, already cited (2 Stat., 49), which had been reenacted in 1862. This exception always applied to acting master's mates down to March 3, 1865, and thereafter to mates, if they be but acting master's mates under a new title. When, therefore,

Congress incorporated this exception into the Revised Statutes without taking any steps to change the meaning that had always attached to it, the intention must have been that it should continue to apply to mates after the enactment of the Revised Statutes just as it had done before.

The rule that when a judicial construction has been given to a statute the reenactment of the statute is generally held to be in effect a legislative adoption of such construction is too familiar to need the citation of authorities (many of which are referred to in *McDonald* v. *Hovey*, 110 U. S., 619, 628), and where a judicial construction has never been called for it is within the spirit of this rule to give to a long-continued executive construction an effect analogous to that of a judicial construction. (Opinion of Attorney-General Olney, 20 A. G. O., 719, 721; see *Earnshaw* v. *Cadwalader*, 146 U. S., 247, 258, citing 18 A. G. O., 530.) It is true that in *Savings Bank* v. *United States* (19 Wall., 227, 237), where the court held that the construction given by the Commissioners of Internal Revenue to a prior act could not be applied to a later act because it was manifestly erroneous, Strong, J., also said that the decisions of the Internal Revenue Commissioners were not judicial, that they had no power to make them in the matter then under consideration, and that there was no presumption that Congress was aware of them; but the circumstances which occasioned those statements of Strong, J., were very different from the present. There the construction given by the Commissioners was both errone-

ous and beyond their power, as it was really an attempt to dispense with what the act of Congress prescribed; whereas here the long-continued executive construction, which classed acting master's mates (and since 1865 mates) as among the officers "temporarily appointed to the duties of a warrant officer" was well known and manifestly correct, so that there can be no reason to suppose that when Congress used those words in the Revised Statutes they did not know that they had always applied to this class of officers, and did not intend that they should cease to apply to them.

It is contended, however, that Revised Statutes, section 1569, recognizes mates as petty officers because it provides that "the pay to be allowed to petty officers, excepting mates, * * * shall be fixed by the President."

Were there anything to show that mates were petty officers before the passage of this act, undoubtedly any words in a statute including mates among petty officers could properly be taken as recognizing that they were so included. As, however, there is nothing to show that this had previously been the case, but manifestly the reverse, mere words of inclusion can not make mates petty officers, unless either the words themselves or something else in the act shows that Congress intended to change the status of mates and make them petty officers. This section, however, operates only upon petty officers, seamen, ordinary seamen, firemen, and coal heavers, and upon them only in regard to their pay and bounty. It does not affect their status, and still less can it affect that of mates, upon whom it does not operate at all. Besides,

"excepting" is a word of exclusion rather than inclusion, and though it may generally denote an exclusion of what is regularly included, yet here, there being no such prior condition of inclusion, the word can only be understood as used in the sense of "but not," so that the real meaning of the section is, "the pay to be allowed to petty officers, but not to mates, shall be fixed by the President."

The utmost that can be claimed for this section is that Congress overlooked the fact that mates were not petty officers, and therefore referred to them as if they were. All parts of a revision of statutes, like all parts of a statute, must be construed with reference to each other; and sections 1408, 1409, and 1410 indicating with sufficient clearness, as already stated, that mates are a class of officers distinct from petty officers, and section 1408 using language which must be understood as meaning that they are actually warrant officers, section 1569 must be construed (as it very readily can be) so as not to conflict with the former sections.

It is also contended that as the most recent executive construction, adopted by the Navy Department in 1893, is that mates are petty officers (Regulations of 1893, art. 28) they must have been so even between March 20, 1888, and August 14, 1891, the period of service which gives rise to the present claim. Of course it is not contended that the Navy Regulations of 1893 could make mates petty officers if they had not previously been such, for if mates were made petty officers in 1893 then they were not so before, and the judgment should be reversed. The contention is merely that the admittedly new ruling of

the Navy Department, in violation of all previous precedent in that Department and not followed in the Treasury (for the court below has found that the Treasury has never yet regarded mates as petty officers), should be received as evidence of the true interpretation of the statutes regarding mates. It is submitted that, in view of what has been stated above, mates must be taken to be either warrant officers or officers "temporarily appointed to the duties of a warrant officer," and more logically the former. Hence this new construction adopted by the Navy Department (but not by Congress, as the act of August 1, 1894, cited above, bears witness) is as far from being conclusive as is the judgment of the court below, which should be reversed.

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